14-10008

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL WEARRY,

Petitioner,

vs.

BURL CAIN, Warden, Louisiana State Penitentiary,

Respondent.

Supreme Court, U.S.
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ON PETITION FOR WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

In this Louisiana capital case, no physical evidence connects Petitioner Michael Wearry to the murder, and his conviction is based largely on the suspect testimony of jailhouse informant Sam Scott, who gave multiple inconsistent statements. Mr. Scott's brother and sister-in-law testified at Petitioner's post-conviction evidentiary hearing that Mr. Scott was with them on the night of the murder and could not have witnessed the murder.

The District Court and the Louisiana Supreme Court denied Petitioner relief after an evidentiary hearing at which Petitioner's sole trial counsel testified that he did not receive certain evidence from the State, including the medical records of one of Petitioner's co-defendants showing that he was recovering from knee surgery the night of the murder, and the attempts by another jailhouse informant to secure a deal despite the State's contention at trial that he did not do so. Trial counsel also testified that he did not conduct a thorough investigation and failed to identify and interview witnesses like Scott's brother and sister-in-law, consult with and retain experts, or effectively cross-examine law enforcement.

The questions presented are:

I. **Did the Louisiana courts err in failing to find that the State's failure to disclose exculpatory evidence violated its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), and that this failure prejudiced the defense?**

II. **Did the Louisiana courts err in failing to find that Petitioner's sole attorney provided ineffective representation at the guilt phase of trial under *Strickland v. Washington*, 466 U.S. 668 (1984)?**

Petitioner Michael Wearry respectfully requests that this Court issue a writ of certiorari to review the decision of the Louisiana Supreme Court.

PARTIES TO THE PROCEEDING IN THE COURTS BELOW

1. Michael Wearry, Plaintiff/Appellant
2. Burl Cain, Warden, Louisiana State Penitentiary

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ON PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Wearry respectfully prays that a Writ of Certiorari issue to review the judgment of the Louisiana Supreme Court entered in this case.

OPINIONS DELIVERED IN THE COURT BELOW

The final judgment and decree rendered by the Louisiana Supreme Court on February 27, 2015, denying Petitioner's writ to review the District Court's denial of post-conviction relief, as well as two dissenting opinions filed therewith, is attached as Appendix A. The August 14, 2013, *Reasons for Judgment* of the Twenty-First Judicial District Court of Livingston Parish, Louisiana, denying Petitioner's application for post-conviction relief is attached as Appendix B.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The Louisiana Supreme Court issued its denial of Petitioner's writ of review on February 27, 2015, and that ruling became final on that date. This Court has jurisdiction under 28 U.S.C. § 1257 to review this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to... have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1.

STATEMENT OF THE CASE

The public defender's opening statement was short. In the transcript, it would take up only about a page. "How many criminals," he asked, "does it take to tell the truth?" He was referring to the State of Louisiana's primary witnesses, who were jailhouse informants. What his opening statement did not mention, of course, were those things he did not know because they were withheld by the State: that medical records of one of his client's co-defendants substantially undermined the story told by the State's only purported eyewitness to the murder; that this eyewitness believed that coming forward with information, even false, about the crime would be a way out of prison; that another jailhouse informant had requested a deal in exchange for his testimony. But his opening statement also did not mention those things he could have known, easily known, if he had

only investigated: that the eyewitness had not been present at the murder scene; in fact, he was not an eyewitness at all.

How many criminals does it take for a jury to see the truth? None. It takes a prosecution who acknowledges the importance to the American criminal justice system of its obligations under *Brady v. Maryland* and turns over material exculpatory evidence to the defense, and a defense team who thoroughly investigates the case. Neither of these was present in the State of Louisiana's case against Michael Wearry.

The Crime

On April 4, 1998, Michael Wearry, then 22 years old, went with his girlfriend, Renarda Dominick, to a wedding in Baton Rouge, Louisiana. It was the night of the annual Strawberry Festival in Ponchatoula, and Mr. Wearry would have rather gone to that, but Ms. Dominick wanted to go to the wedding—she considered the groom, Jimmy Helm, a stepbrother—and so they went to the wedding, leaving at about 5:30 p.m. Mr. Wearry was uncomfortable because he did not really know anyone at the wedding but Ms. Dominick, including Jimmy and his bride, Rene, but Ms. Dominick tried to make it easier for him by introducing him to some members of her family. Still, he spent a portion of the reception outside by the car. Ms. Dominick recalled that she left the reception at 9 or 9:30 p.m., Mr. Wearry in tow. They stopped for gas and headed to her grandmother's house, where they arrived around 10:30 p.m.

Around 9:30 p.m., about the same time as Mr. Wearry was leaving the Helm wedding more than 40 miles away, the body of a teenage boy was found lying face down on the side of a gravel road in a rural area of Hammond, Louisiana. He was identified as 16-year-old Eric Walber. Earlier that evening, Mr. Walber had been delivering pizzas for the Pizza Express in his car, a red, two-door 1988 Ford Escort hatchback. He delivered the

final pizza of the night at about 8:15 p.m., and was expected later that evening at a friend's house. He never showed up. Sometime between that final delivery and 9:30 p.m., he was beaten to death. His car was found four days later behind an abandoned junior high school. The inside of the car was covered in blood.

Mr. Walber was an honor student and a football player. His death and the search for those responsible were widely reported in the print and television media. But the local authorities – the Tangipahoa Parish Sheriff's Office, which was leading the investigation, with the assistance of the Livingston Parish Sheriff's Office – were making little progress. The victim's car contained no fingerprints, fibers or DNA that connected anyone to the crime other than the victim. Although suspects were identified, no arrests were made. Mr. Wearry's name came up as a potential suspect, but he was quickly cleared after investigators learned of his alibi.

The first anniversary of Mr. Walber's death came and went, and then the second. The case had gone cold.

A Jailhouse Informant Comes Forward and an Indictment is Issued

In April 2000, an inmate at the Hunt Correctional Center contacted detectives, telling them that he wanted to discuss what he knew about three murders, including Mr. Walber's. Mr. Walber had been dead for more than two years, but the case was still in the news. The second anniversary of his death was commemorated in the local newspaper, and nationally, the case had been featured in January 2000 on *America's Most Wanted*. The inmate's name was Sam Scott and what he told detectives about Mr. Walber's death would eventually lead to the indictment, conviction and death sentence of Mr. Wearry, despite the fact that, at the time of his first statement in April 2000, Mr. Scott did not seem to actually know very much about the crime at all.

Mr. Scott gave five statements to investigators in April and May 2000. In his first statement, on April 18, he told investigators that he and Mr. Walber were good friends and that on the night he died, Mr. Walber had come looking for Mr. Scott, who was at work at the Winn-Dixie warehouse. Mr. Walber instead encountered Mr. Wearry and four other men, including Randy Hutchinson. The five men, Mr. Scott said, got into Mr. Walber's car (which Scott described variously as an Isuzu, Nissan or Honda that was green, blue, gray or black) and drove around. Mr. Scott said he saw them at about 11 p.m., while on break, and later learned from them that they had shot Mr. Walber and then run him over with his car.

In a second statement 20 minutes later, Mr. Scott said that he had not been working that night, but was with Mr. Wearry, Mr. Hutchinson, and the four others who drove around with Mr. Walber in his car (presumably, that green, blue, gray or black Isuzu, Nissan or Honda). They were smoking marijuana. The others decided to jump Mr. Walber and take his money. Mr. Walber was shot and then run over with his car. The body was left on Blahut Road.

These April 18 statements were not consistent with the evidence. Mr. Walber did not drive a green, blue, gray or black Isuzu, Nissan or Honda. He drove a small red Ford Escort. He was not shot. And his body was not found on Blahut Road, but rather Crisp Road. By the time of his fifth statement to investigators on May 1, 2000, however, Mr. Scott was no longer claiming that Mr. Walber had been shot, and he had correctly identified that the body was found on Crisp Road.

There was no physical evidence of any sort linking Mr. Wearry to the crime. Nevertheless, a Livingston Pariah grand jury indicted Mr. Wearry for the murder of Eric

Walber in June 2000. Mr. Hutchinson and two other men were also indicted. Mr. Scott was not among them.[1]

The Trial

Corbett Ourso, Jr., a public defender, was appointed to represent Mr. Wearry at trial. Mr. Ourso began his investigation less than a month before the trial began, even though it had been nine months since the indictment. This investigation included only one documented meeting with Mr. Wearry outside of court proceedings. Mr. Ourso did not investigate Sam Scott, his story, or his whereabouts on the night of Eric Walber's murder. Mr. Ourso did not consult with or engage any experts, such as a forensic pathologist who could analyze Mr. Scott's claims as to how Mr. Walber's death occurred. In fact, he did no forensic investigation at all. He also did little to no mitigation investigation. And although there were at least 50 guests at the Helm wedding, and maybe up to 150, Mr. Ourso's alibi investigation consisted of talking to Ms. Dominick, her aunt and her sister. He asked the investigator at the public defender's office to interview Jimmy and Rene Helm, but there is no documentation that the investigator ever did so.

The trial began on February 26, 2002. Mr. Ourso made a brief opening statement, telling the jury that no physical evidence connected Mr. Wearry to the crime and that the State was asking them for a conviction based on the word of criminals. He did not mention Mr. Wearry's alibi. The alibi would not come up until Mr. Ourso's cross-examination of the tenth witness to testify, although even then he did not mention the word "wedding." When it came time for Mr. Ourso to present his case, he did not have a

[1] Mr. Scott was eventually charged with manslaughter in 2005, and after a plea of no contest, was sentenced to 10 years, running concurrently with any other charges then pending and all time served since December 1997.

complete list of the wedding guests and did not call anyone to testify in support of Mr. Wearry's alibi other than Mr. Wearry's girlfriend and two of her relatives.

Because no physical evidence linked Mr. Wearry to the crime, the State's case largely hinged on the testimony of Mr. Scott, its only eyewitness to the murder, and another jailhouse informant, Eric Charles Brown.

Testimony of Sam Scott

At trial, Mr. Scott claimed that he came forward with information about the murder of Mr. Walber (and the two other murders) because of a crisis of conscience: he could not eat or sleep. He told the following story:

On April 4, 1998, Mr. Scott was shooting dice with Mr. Wearry, Randy Hutchinson, and others. When Mr. Wearry lost all of his money, he told the others he was going to rob someone. Mr. Walber was driving past, and Mr. Hutchinson ran out into the street to flag him down. Mr. Wearry and Mr. Hutchinson pulled Mr. Walber out of the car, and Mr. Hutchinson shoved him back into the cargo space of the hatchback through the passenger side door. The two men, together with Mr. Scott and two others (making five men total, plus Mr. Walber in the cargo space), then drove around, stopping at least three times to allow Mr. Hutchinson to pull Mr. Walber out of the car, beat him up for several minutes (with a stick, or his hands), and then return him to the cargo space. Once, Mr. Hutchinson crawled into the cargo space with Mr. Walber. By the time the group got to Crisp Road, Mr. Hutchinson pulled Mr. Walber out of the car for a final time. He and Mr. Wearry put him down in the road, and the driver of the Escort revved the car's engine, ran over the boy; turned around, ran him over again, and then backed over him.

Testimony of Eric Charles Brown

Eric Charles Brown testified that on April 4, 1998, he saw Mr. Wearry in a red car with a young white man and, although the man was not beaten or bloodied, when he saw the news report on Mr. Walber's death, he learned what had happened. However, he did not go to the police. He came forward only later because his sister knew the victim's sister. The State assured the jury that Mr. Brown had not asked for or received any deal in exchange for his testimony.

Verdict and Sentencing

On March 5, 2002, Mr. Wearry was convicted of the first degree murder of Eric Walber. The penalty phase of the trial began the morning of March 6, 2002. Mr. Ourso began calling witnesses for Mr. Wearry's mitigation case at 11:40 a.m. and rested at 12:20 p.m. The jury returned a sentence of death that afternoon.

Evidentiary Hearing

An evidentiary hearing was held by the Louisiana District Court in August 2012 and June 2013 on all claims raised in Mr. Wearry's post-conviction petition. Testimony at the August 2012 hearing established that the story told by Sam Scott at Mr. Wearry's trial was not only implausible, but a lie. On the night of April 4, 1998, as Mr. Walber was making his final delivery of the night and Mr. Wearry was just trying to get through the Helm wedding reception, Sam Scott was at the Ponchatoula Strawberry Festival with his brother, Lakendrick Scott.

Lakendrick Scott is Sam Scott's younger brother and a veteran of the United States Army. On April 4, 1998, he and Sam drove together to Springfield, Louisiana to a birthday party for their mother and uncle. They arrived late morning, 10 or 11 a.m., and stayed until 5 or 5:30 p.m. After they left the party, Sam drove them to his girlfriend's

house and then to the Strawberry Festival in Ponchatoula. Lakendrick testified that they arrived at the Strawberry Festival at about 6:30 or 7 p.m., and while there, met up with Doris Dantzler and other friends, including two of Mr. Wearry's co-defendants. Sam and Lakendrick left the Strawberry Festival together around 9:30 p.m., and after picking up Sam's girlfriend from the gas station at which she worked, drove around smoking marijuana until 11 p.m.

Doris Dantzler, now Dantzler-Scott (she and Lakendrick married in 2002), also testified at the evidentiary hearing. She too remembered being at the Ponchatoula Strawberry Festival on April 4, 1998, with Lakendrick and Sam, and recalled that it was their mother's birthday. That date has special meaning to Doris for another reason: it was her "first official date" with Lakendrick, her future husband. She met up with Lakendrick and Sam around 7 p.m. and they were together for 45 minutes to an hour.

Because Sam Scott was with his brother on the evening of April 4, 1998, from the time Mr. Walber made his final pizza delivery (at about 8:15 p.m.) to the time Mr. Walber's body was found (9:30 p.m.), he could not have seen Mr. Walber's murder. The statements he gave to investigators more than two years later and his testimony at trial which placed him at or around the crime scene could not have been true. The State's investigation file offers some explanation for why Mr. Scott falsely told investigators that he had witnessed Mr. Walber's murder. Although the State claimed that Mr. Scott came forward because of a crisis of conscience, police records suggest that Mr. Scott recognized that offering up information in this heavily publicized case could be a ticket out of prison. He told at least one other inmate that telling investigators something about Eric Walber's death could "help him get out of jail" and encouraged the inmate to just lie. Police records also suggest that Mr. Scott had a grudge against Mr. Wearry. In an affidavit obtained by

investigators, another inmate said that Mr. Scott told him that he did not know who committed the crime, but he was going to make sure that Mr. Wearry "got the needle" for it, because Mr. Scott felt betrayed by Mr. Wearry. These police records, which revealed Mr. Scott's motives for coming forward and falsely implicating Mr. Wearry, were not turned over to trial counsel.

Sam Scott's testimony at Mr. Wearry's trial was not only false in light of Lakendrick and Doris Scott's testimonies at the evidentiary hearing, but was also implausible and inconsistent with evidence on at least two counts: his testimony regarding Mr. Hutchinson's role in the murder and his testimony regarding the manner in which Mr. Walber had died.

First, Mr. Scott's testimony regarding Mr. Hutchinson's actions on the night of the crime was not medically feasible. On March 26, 1998, nine days before the murder, Mr. Hutchinson had surgery on his right knee – the repair of a torn patellar tendon.[2] Dr. Paul Dworak, an orthopedic surgeon, testified at the post-conviction hearing that, to a reasonable degree of medical certainty, Mr. Hutchinson could not have done what Mr. Scott said he did without rupturing the repair, and leaving Mr. Hutchinson unable to walk, which did not occur.[3] Specifically, Dr. Dworak noted that at the time of the murder, Mr. Hutchinson was not physically able to run, was not physically able to bend his knee

[2] As Dr. Paul Dworak testified, the patellar tendon connects the kneecap to the tibia bone, and if it is torn or disrupted, you would not be able to extend or straighten your leg, even to walk. The surgery Mr. Hutchinson received involved multiple sutures on the tear. Wire attaching the kneecap to the tibia was also inserted to relieve some of the pressure on the torn tendon.

[3] On May 5, 1998, Mr. Hutchinson's medical records showed that the repair was still intact. August 2012 Hearing Ex. 4, pp. DAMW002230.

90 degrees, and was not physically able to lift significant weight.[4] Mr. Hutchinson's father, Paul Richardson, also testified at the post-conviction evidentiary hearing, telling the court that Mr. Hutchinson could not walk unassisted in the days following his surgery. And yet, in Mr. Scott's tale, a 200-pound Mr. Hutchinson had managed to run out into the street to flag down Mr. Walber's car, had climbed through the passenger door of a two-door vehicle and over the back seat into the hatchback area, and had reached into the car to pull out the 190-pound teenager multiple times.

Prosecutor Charlotte Herbert testified at the evidentiary hearing that prior to the trial, she obtained Randy Hutchinson's medical records by subpoena but did not turn the records over to Mr. Wearry's defense counsel.

Second, Mr. Scott's testimony regarding how Mr. Walber had died was not medically feasible. At the post-conviction evidentiary hearing, Dr. LeRoy Riddick, an expert in forensic pathology, testified to a reasonable degree of medical certainty that, based on his injuries, Mr. Walber had not been struck by a car that had been 'revved up' and that a car had not passed over Mr. Walber more than once. The testimony of Mr. Scott, in Dr. Riddick's view, was false.

The expert testimony of Drs. Dworak and Riddick at the evidentiary hearing demonstrated the implausibility of and inaccuracies in Mr. Scott's story. The testimony of Lakendrick and Doris Scott established that Mr. Scott was lying about having witnessed the murder.

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[4] At the post-conviction evidentiary hearing, the State presented evidence from its own orthopedic surgeon, Dr. Greg Kinnaird, who testified that it would have been "possible" for Mr. Hutchinson to perform the acts described by Sam Scott, but that they would have presented risk to the repair.

Although Mr. Scott's inconsistent statements[9] and Mr. Wearry's alibi cast significant doubt on the State's theory of the case and its timeline, Mr. Ourso, the public defender appointed to represent Mr. Wearry at trial, acknowledged at the evidentiary hearing that he did not contact any experts; did not contact Lakendrick Scott or investigate the witnesses and co-defendants other than to instruct the public defender's investigator to look into their criminal backgrounds and any statements they had made; did not follow up to see what the investigator had done; and did not mention Mr. Wearry's alibi in his opening statement. He further acknowledged he had no strategic reason behind decisions he had made.

Jim Boren, a criminal defense attorney in Baton Rouge, Louisiana, testified at the evidentiary hearing as an expert in the standards of death penalty representation at the time of Mr. Wearry's trial. Mr. Boren explained that at the time of Mr. Wearry's trial, the prevailing standard in a capital case was that the attorney establish a defense team of two lawyers, a fact investigator and a mitigation specialist; develop a relationship with his client through many hours of meetings; and establish a theory of the case to discuss with the jury in opening arguments. None of these standards were met by Mr. Ourso. In addition, Mr. Boren testified that the standard of practice at the time of Mr. Wearry's trial

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[9] Mr. Scott explained his inconsistent statements at trial by saying that he had simply been lying to investigators at first. He was lying when he initially told investigators that he knew Mr. Walker; he was lying when he said he was at work the evening of the murder and had only heard about it later on. But evidence presented at the evidentiary hearing showed that his evolving statements became more and more consistent with the evidence, not because he simply stopped lying, or because his memory had improved, but because in the course of their interviews with Mr. Scott, investigators had given him the correct information. In Mr. Scott's first interview on April 18, 2000, for example, it was Detective Murphy Martin who mentioned that the crime had occurred on a gravel road. Mr. Scott later took up this information, and said that Mr. Walker had been killed "on a gravel road on Blahut." Detective Martin responded: "Sam, y'all didn't take the boy nowhere else? Because the boy was found at another place. . . . It was a gravel road, but it wasn't on Blahut Road." By the next day, Mr. Scott knew that the body had been found on Crisp Road. In a deposition taken on November 17, 2010, which was entered into evidence at the evidentiary hearing, Detective Martin acknowledged that he had given Mr. Scott material facts about the location of the crime.

required the defense to retain a forensic pathologist, even in non-capital cases. Again, this standard was not met by Mr. Ourso. Finally, Mr. Boren testified that the standard of practice at the time of Mr. Wearry's trial would have required Mr. Ourso to thoroughly investigate Mr. Wearry's alibi (including compiling a list of wedding guests and talking to each of them) and co-defendants, which Mr. Ourso did not do. Mr. Boren concluded that Mr. Ourso had failed to conduct an adequate investigation consistent with the standards and practices at the time of Mr. Wearry's trial.

On August 14, 2013, following the evidentiary hearing, the District Court denied relief and issued its Reasons for Judgment. The court first found that Mr. Ourso's representation of Mr. Wearry was not ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), stating that, although this representation was "perhaps not the best defense that could have been rendered, [it] was not so deficient as to satisfy the *Strickland* standard." Turning to Mr. Wearry's claims that the State had withheld material exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), the court acknowledged that the State "probably sought to have" turned over the evidence listed in Mr. Wearry's petition but nevertheless the court found that:

> [N]one of the evidence noted in the instant application may be categorized as "material" in the context of possible *Brady* violations. Further, even in the event that the fact of non-disclosure itself may be classified as a violation, none of the evidence identified, in the event that it had been effectively utilized by defense counsel at trial, produces a reasonable probability that the defendant would have been acquitted.

Appendix B, at 5.

On October 14, 2013, Mr. Wearry timely filed an application for writ of review with the Louisiana Supreme Court. The application was denied by the Louisiana Supreme Court on February 27, 2015. No reasons for the denial were issued.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO STOP THE STATE OF LOUISIANA FROM REFUSING TO COMPLY WITH ITS OBLIGATIONS UNDER BRADY V. MARYLAND.

Petitioner seeks the Court's intervention to prevent the desecration of cherished Constitutional protections in the State of Louisiana. Under the American system of justice, "[the state's] interest...in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. U.S.*, 295 U.S. 78, 88 (1935). Petitioner established at his post-conviction hearing that the State flouted this principle, withholding from the defense a trove of material, exculpatory evidence that would have been presented at anything resembling a fair trial. And yet, the District Court was unconcerned, concluding only that "insofar as the State failed to produce the evidence listed in the instant application, it probably ought to have done so." Appendix B, at 5.

Under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the prosecution violates a defendant's right to due process if it fails to disclose evidence that is both material to guilt or punishment and favorable to the defendant's case. To establish a *Brady* violation, the defendant must prove that (1) the prosecution suppressed evidence; (2) the suppressed evidence was favorable to the accused; and (3) the suppressed evidence was material either to guilt or to punishment. *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995). Information that must be disclosed by the prosecution under *Brady* is not limited to physical evidence, but includes any evidence that impeaches the testimony of a witness where the reliability or credibility of the witness may be determinative of guilt or innocence. *See Giglio v. United States*, 405 U.S. 150, 154 (1972). Moreover, the duty to disclose favorable evidence is not limited to evidence in the actual possession of the prosecutor; it extends to evidence in the possession of the entire State team, including all

investigative and government agencies. *Kyles*, 514 U.S. at 437. Further, in assessing *Brady* claims, courts must look to the cumulative effect of all evidence withheld by the State. *See Kyles*, 514 U.S. at 436-43 (Because materiality is assessed "in terms of the cumulative effect of suppression," a court should consider the suppressed evidence "collectively, not item by item.").

In *Smith v. Cain*, this Court granted *certiorari* and reversed Louisiana's denial of post-conviction relief where the State withheld evidence impeaching the State's only eyewitness to the crime. *Smith v. Cain*, 132 S. Ct. 627, 630-31 (2012). Similar relief is warranted here, where the State suppressed evidence showing that Sam Scott, the State's only purported eyewitness to the murder, was lying to the jury.

A. The State Suppressed Randy Hutchinson's Medical Records.

The State suppressed all medical records relating to Randy Hutchinson's knee surgery. Evidence at the post-conviction hearing established that the prosecution had possession of the medical records, having obtained them by subpoena years before Petitioner's trial. *See* August 2012 Hearing Ex. 4, Randy Hutchinson's medical records, at p. DAMW002217. In seeking the subpoena, the State told the Court that Hutchinson's medical records were "necessary" for the ongoing investigation of Mr. Walber's murder. *Id.* The evidence at the hearing also established that the prosecution did not turn the records over to the defense. August 2012 Tr. p. 223: 26-31. As discussed above, these records are a significant piece of material exculpatory evidence, given the nature of Hutchinson's surgery, the surgery's proximity in time to the murder, and Sam Scott's description of Hutchinson's feats of strength and acrobatics the night of the murder.

At the post-conviction hearing, Assistant District Attorney Charlotte Herbert admitted that it was important for the State to know what Hutchinson's physical condition

was on April 4, 1998, given Mr. Scott's description of his activities. August 2012 Tr., p. 221: 11-27. And as set forth above, the answer was that Hutchinson's mobility was significantly limited, according to the expert testimony of orthopedic surgeon Dr. Paul Dworak: Hutchinson could not run, could not bend his knee to a 90 degree angle, and could not lift substantial weight. Dr. Dworak opined to a reasonable degree of medical certainty that Randy Hutchinson would not have been capable of engaging in the conduct described by Sam Scott.

The District Court, denying relief, concluded that Hutchinson's "medical records do not show that he could not have participated in the crime by virtue of his physical condition. To the contrary, Hutchinson's medical records indicate that he was not compliant with the limitations on physical activity prescribed by his treating physician." Appendix B, at 5. The District Court went on to say that "when viewed in the context of testimony by the State's expert, Dr. Greg Kinnet [sic] . . . the inclusion of Hutchinson's medical records as evidence . . . does not produce a reasonable probability of acquittal." *Id.* In reaching its decision, the District Court not only misapplied the *Brady* test, but also erroneously stepped in as the ultimate fact finder, usurping the role of the jury to reject Dr. Dworak's testimony in favor of the State's medical expert.

First, the District Court's conclusion that there is no viable *Brady* claim because Hutchinson *could* have participated in the crime is a misapplication of *Brady*. Indeed, the District Court offered the very same fallacious reasoning that required a reversal by this Court in *Smith v. Cain*. *See* 132 S. Ct. at 630 ("the State's argument offers a reason that the jury *could* have disbelieved [the undisclosed exculpatory evidence], but gives us no confidence that it *would* have done so") (emphasis in original). *Brady* relief is not about whether something is possible. The question is whether disclosure of the suppressed

evidence to competent counsel would have made a different result reasonably probable, *Kyles*, 514 U.S. at 441, or whether the new evidence could reasonably be taken to put the case in a different light. *Id.*, 514 U.S. at 434-35. Even if the jury had rejected Dr. Dworak's opinion that Sam Scott had described a medical impossibility, it could nevertheless have determined that Sam Scott's account was extremely unlikely. This, combined with the other factors making Scott's testimony inherently suspect, would have put the case in an entirely different light.

The jury should have heard this evidence and decided itself whether to accept or to reject Dr. Dworak's testimony, or to weigh such evidence against other expert or lay testimony. Medical evidence casting doubt on the story of the State's only purported eyewitness to the murder would have painted a very different picture for the jury, particularly in a case in which the witness's prior statements raised legitimate concerns as to whether he had witnessed the crime at all. In determining prejudice from a *Brady* violation, the inquiry does not turn on which evidence the court, in hindsight, determines the jury would have considered more important. Rather, the issue is simply whether the new evidence could reasonably be taken to put the case in a different light. *See Kyles*, 514 U.S. at 434-35.[9] That standard is satisfied here, and the District Court erred by disregarding the correct standard.

Second, the District Court erred when it analyzed the suppressed medical records "in the context of testimony by the State's expert, Dr. Greg Kinnet [sic] ...." Appendix B, at 8. The District Court did precisely what this Court has cautioned against doing: rather

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[9] Even without Dr. Dworak, the medical records combined with the testimony of the State's expert, Dr. Kinnett, would have painted a different picture for the jury, with Dr. Kinnett's admissions that each of the various activities described by Scott would have created a risk of rupturing Hutchinson's tendon repair.

than analyze whether all the suppressed material would have cast the case in a different light, the District Court focused on evidence the jury never saw and which the District Court, in hindsight, determined the jury would have considered more important. That is, the District Court speculated that a hypothetical jury seeing the medical records and hearing the testimony of Drs. Dworak and Kinnett would have rejected Dworak's testimony, credited Kinnett's testimony, and convicted Michael Wearry. *See Porter v. McCollum*, 558 U.S. 30, 43 (2009) (reversing capital sentence where, even though the state's experts challenged the petitioner's expert's methods and conclusions, "it was not reasonable to discount entirely the effect that his testimony may have had on the jury"). Petitioner seeks this Court's intervention because the Constitution guarantees a fair trial, despite judicial assurances that his conviction was guaranteed.

B. The State Suppressed Eric Charles Brown's Efforts to Get A Deal, Then Lied About it to the Jury.

The State withheld evidence impeaching its other key witness and then capitalized on its own misconduct by touting the lack of such evidence to the jury. The State's second most important witness against Petitioner was Eric Charles Brown, another jailhouse informant. Well aware of the credibility problems this posed, the State tried to stay in front of the issue, telling the jury in its opening statement, "Eric Charles Brown doesn't have no [sic] deal. He don't [sic] need one. ***He doesn't want one***, he didn't do anything." Trial Tr., p. 1723 (emphasis added). The theme of Brown's pure heart continued during direct examination, when Brown, prompted by the State with the question, "What was it about that kid that is making you come in here and tell it today?" responded, "my little sister knew his sister." *Id.* at p. 2206. The State hammered the theme home to the jury in closing:

> Eric Charles Brown told you what he saw that night. He comes in here with no deal, nothing. In fact, . . . Michael Wearry is his buddy. But even then he is still coming in. He has no deal on the table. Why else come? What did he tell you? His little sister, this boy's little sister, was nice to my little sister and that family deserves to know.

Id. at p. 2309.

There is a problem with the State's carefully orchestrated presentation of Brown as a true-hearted, noble witness ratting on a friend in order to be kind to a grieving family: it is not true. While the State was making these impassioned pleas to the jury, the State was sitting on suppressed evidence casting Brown in a radically different light. Police notes withheld by the State show that when Mr. Brown first came forward, he did not mention his little sister. He did, however, mention that he wanted favorable treatment on charges against him in exchange for the information:

> Eric [Brown] asked what this was about. I told him it was about the killing of the pizza boy. He started telling us he knew nothing. I then told him who we had in custody. He then said I didn't kill anyone. I told him we knew he wasn't involved in the killing but if he saw something he should tell us. He said he didn't need any more charges. I told him if he wasn't involved he might not have any more charges. ***He asked if he told what he knew would we not charge him and would we help with the sentence he already had. We told him we couldn't promise him anything but we would talk to D.A. if he told the truth.***

August 2012 Hearing Ex. 13, at p. DAMW000191 (emphasis added). There is more. Brown, through counsel, directly asked the District Attorney for a deal. On June 8, 2000, Brown's attorney, Mike Nunnery, wrote to District Attorney Scott Perrilloux on Brown's behalf:

> [P]lease give serious consideration to dropping the severed possession charges against him. The totality of the circumstances are such that justice would require that the possession charge be dropped.

August 2012 Hearing Ex. 13, at p. LPSO000798. This request came mere months after Mr. Brown first spoke to police about the Walber murder (and asked for a deal), and before Mr. Brown testified at Mr. Wearry's trial. It is undisputed that these documents were withheld from the defense.

The District Court cast this claim aside, stating that "there is no evidence to suggest that Brown was actually able to obtain any benefit or any assurance of a possibility thereof prior to testifying at trial." Appendix B, at 6. Whether there is proof that Brown actually obtained favorable treatment is beside the point. The suppressed documents directly contradict what the State told the jury, that not only did Eric Charles Brown not have a deal, he did not want or ask for one, and that he came forward out of altruism. Under these circumstances, the jury should hear evidence showing a desire to get a deal, even where a formal deal is never reached. *See Napue v. Illinois*, 360 U.S. 264, 270 (1959) (noting that the key question is not whether the prosecutor and the witness entered into an effective agreement, but whether the witness "might have believed that [the state] was in a position to implement...any promise of consideration.")

Here there is no question that the suppressed evidence was inconsistent with both Brown's testimony and with the State's repeated assurances to the jury that Brown's motives were pure. The District Court simply disregarded the possibility—factually supported in this case and legally supported in the case law—that Brown's requests for a deal and the State's vague assurances could have colored the jury's view of Brown and his testimony. Of course such information was important to evaluating Brown's credibility, or

the State would not have told the jury at least twice that Brown hadn't asked for a deal,[7] much less elicited, then retold, the story about Brown's little sister.

The District Court's ruling on this particular issue gives prosecutors a perverse incentive. Despite noting that "as a matter of policy, it is better to err on the side of disclosure," Appendix B, at 5, the District Court not only condoned the suppression of this exculpatory evidence, but gave cover to the prosecution, ***which benefited from its own bad conduct by crafting and presenting a trial theme (the sweet tale of Eric Charles Brown's little sister) belied by the suppressed evidence.*** Why should the prosecution *ever* disclose exculpatory evidence that might interfere with its trial narrative? Why indeed, when the District Court will simply content itself with noting the omission and holding that this, like every other bit of suppressed evidence, would not have made any difference to the jury? That is not the correct standard and courts should not be permitted to adopt it as the standard.

Here, the State argued in its opening statement, through its presentation of evidence, and in closing arguments, that Brown had no ulterior motive and no reason to lie. The State thus acknowledged that the jury's estimation of Brown's truthfulness could be determinative of guilt or innocence. The State cannot now be permitted to claim that the suppressed evidence was not material. The suppression of this evidance, alone or cumulatively with the other suppressed evidence described in this Petition, requires a reversal of the District Court's denial of post-conviction relief. *See* Kyles, 514 U.S. at 436-437.

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[7] The State told the jury in its opening statement that Brown "doesn't want" a deal and even though he was "doing 15 years on a drug charge right now, hasn't asked for a thing." Trial Tr., p. 1723.

C. The State Suppressed Evidence Inconsistent with Sam Scott's Purported Pure Motives in Coming Forward.

The District Court ignored a similar category of *Brady* evidence, this time involving prior statements by the State's key witness, Sam Scott. At the evidentiary hearing, trial counsel Corbett Ourso confirmed that he never received a number of additional documents that undermined Scott's credibility and put the lie to the State's theory that Scott came forward to testify because of a nagging conscience.

These suppressed documents included a police report relating to one of Scott's fellow inmates, Kedrick Johnson, in which Johnson claimed to have witnessed the murder. August 2012 Hearing Ex. 13, at p. DAMW000197. Johnson later recanted, however, telling detectives that "he had lied . . . . He hadn't heard anything." August 2012 Hearing Ex. 13, at p. DAMW000175. He had come forward because Sam Scott "told him it would help him get out of jail." *Id.* The implication to this interaction is that if Scott told Kedrick Johnson that lying about the Walber murder would help Johnson get out of jail, then Scott thought that his doing so would get him out of jail as well.

Also suppressed was evidence concerning another of Scott's fellow inmates, Reggie Jackson, who offered investigators the reason for Scott's testimony against Petitioner: self-protection and animus. According to Jackson, Scott said: "[M]an, I'm caught up in the middle of this bullshit they're trying to get me to take the stand. They are trying to give me 10 years, at first I wasn't charged with nothing now if I don't testify I'm going to have to take the charge. . . . Now they keep trying to give me the charge and I got to do what I got to do." August 2012 Hearing Ex. 13, at pp. DAMW001886-88. Jackson had still more to tell. In an affidavit, he swore that Scott said "I'm gonna make sure Mike gets the needle cause he jacked over me." *Id.* Both the tenor and content of these withheld

documents flatly contradict the State's portrait of Scott as the noble reformed criminal, whose conscience would not allow him to remain silent, even though he knew that his testimony would result in more prison time. Scott's statements to Jackson showed that he was testifying only so that he would not have to take the charge in the murder and that Petitioner was a deserving fall guy.

As with Eric Brown, the State attempted to overcome the credibility problems that come with reliance on jailhouse snitch testimony by trumpeting Scott's pure motives. And again as with Brown, the State simply kept the lid on any evidence that did not fit the theme. At trial, the State convinced the jury that Scott was a guilt-ridden truth-teller, a reformed offender who had the courage to speak the truth, even at the cost of his own freedom. The withheld statements of Kedrick Johnson and Reggie Jackson paint a different picture of Scott, one of a savvy manipulator who knows how to work the system, who knew that blaming Petitioner "could help him get out of jail," and who held enough of a grudge after being "jacked over" that he would do or say anything to "make sure Mike gets the needle." The defense should have had this important evidence and the opportunity to correct the jury's misconception about the State's key witness.

In sum, the State presented two purported witnesses to Petitioner's participation in the crime for which he was convicted. Both are criminals of questionable credibility and shadowy motives. The State aggressively undertook efforts to convince the jury of their pure hearts and unselfish motives, and, by extension, their trustworthiness, while at the same time, suppressing any evidence to the contrary. Given the centrality of Brown and Scott to the State's case, evidence undermining their credibility was material and exculpatory, and should have been turned over to the defense and presented to the jury. Because it was not, Petitioner should be granted relief.

D. The State Withheld a Material Prior Inconsistent Statement by its Rebuttal Witness, Rene Helm.

The State also improperly suppressed evidence that supported Petitioner's alibi. The State never disputed that Petitioner and his girlfriend, Renarda Dominick, attended the Helm wedding reception, which began no earlier than 6:00 p.m. on the night of April 4, 1998. Of the 100 or so guests at the reception, the State did not identify a single person who claimed to have seen Petitioner and Ms. Dominick leave the reception in time for Petitioner to make it to the crime scene before Mr. Walber's body was discovered.

The only wedding guest put on by the State to rebut Petitioner's alibi was the bride, Rene Helm, who testified that she and her husband were the last to leave the reception between 8:30 p.m. and 8:45 p.m. *State of La. v. Michael Wearry*, 931 So. 2d 297, 309 (La. 2006). The State specifically asked Ms. Helm, "When you left, by the time you left, Michael Wearry, Renarda Dominick were already gone?" Trial Tr., p. 2290. And Ms. Helm's answer was, "Yes. We didn't see them, so we assume [sic] they were gone, you know." *Id.* (emphasis added). Yet, Ms. Helm told detectives in April 1999, three years earlier (and only a year after her wedding), that she had seen Petitioner at her reception, and that when she left the reception between 8:30 p.m. and 9 p.m., she did not know whether or not he was still there. August 2012 Hearing Ex. 5, Statement of Rene Helm, at pp. 1-2. When she left, other guests were still there, eating. *Id.* That is, at trial Ms. Helm testified that Petitioner was already gone when she left her reception, but she had previously told investigators that she did not know whether he was still there when she left.

On cross examination at the August 2012 evidentiary hearing, Assistant District Attorney Charlotte Herbert conceded that Ms. Helm's earlier statement could be

construed as inconsistent with her trial testimony, and that the State withheld the statement from the defense. August 14, 2012 Tr., pp. 226: 24 – 227: 3. However, the District Court disagreed with both Petitioner and the District Attorney, concluding that "Ms. Helm's statement would not have been appreciably different from her trial testimony," and was therefore useless as impeachment. Appendix B, at 5-6. It bears repeating that the State presented the testimony of Ms. Helm to the jury to rebut evidence suggesting that Petitioner was in Baton Rouge at the time of the crime. What made Ms. Helm's trial testimony probative was her observation that at 8:30 p.m., she and her husband ***were the last to leave the reception***. This compelled the inference that Petitioner had left the reception by 8:30 p.m.

By contrast, in the suppressed pre-trial statement, Ms. Helm made it clear that ***she was not the last to leave the reception***: some guests remained, still eating. Ms. Helm went on to admit to police that ***she did not know whether Petitioner was still at the reception when she left***. The State therefore used Ms. Helm to convince the jury that Petitioner left the wedding reception early, even though—unbeknownst to defense counsel—she had previously disclaimed any such knowledge. Without Ms. Helm's testimony that she and the groom were the last to leave the reception (the very testimony that is belied by the withheld statement), there would have been no reason for the State to call her as a witness. If anything, Ms. Helm would have been a *defense* witness.

The suppressed evidence of Ms. Helm's prior inconsistent statement, alone or combined with the additional suppressed evidence discussed above, is more than sufficient to undermine confidence in the outcome of Petitioner's trial.

E. The State's Suppression of Evidence was Severely Prejudicial.

The suppression of the evidence described above prejudiced Petitioner. The State had no physical evidence connecting Petitioner, or anyone else, to the crime. Sam Scott, the State's only purported eyewitness to the murder, was a jailhouse informant who had provided a series of wildly inconsistent accounts, casting doubt on whether he had witnessed the events he described. Against this backdrop, evidence directly contradicting Scott's story—medical evidence about Randy Hutchinson and evidence contradicting the State's profession of Scott's pure motives—would have put the case in an entirely different light.

Similarly, the State urged the jury, in opening and in summation, to accept testimony from the State's other key witness, Eric Charles Brown, by repeatedly disclaiming any selfish motive on Brown's part. The State thus admitted that evidence regarding Brown's pure motives was of critical importance to the jury. Evidence to the contrary would have made a meaningful difference to the case presented to the jury, making a different outcome reasonably probable.

Finally, Petitioner had an alibi defense (his presence at a wedding reception in Baton Rouge) that was at one point strong enough to clear him of suspicion. The issue was important enough that the State presented Ms. Helm as a rebuttal witness to attempt to establish his departure time. The suppressed prior statement by Ms. Helm would have made her worthless as a rebuttal witness, because in it she disclaimed any knowledge of Petitioner's time of departure. The suppression was unquestionably prejudicial.

Perhaps the most egregious error made by the District Court in denying relief on Petitioner's *Brady* claims was its use of a piecemeal analysis rather than considering prejudice on a cumulative basis. The District Court focused on each item of suppressed

evidence individually before concluding that each one, in isolation, would not have raised a reasonable probability of an acquittal. There is *no* reference in the District Court's decision to *any* consideration of cumulative prejudice. This piecemeal approach starkly contrasts with this Court's jurisprudence, which requires the evaluation of the importance of the suppressed information in its totality and in the light of the evidence that was presented to the jury at trial. *Kyles*, 514 U.S. at 436. The suppression of all the evidence described above, particularly viewed against the weakness of the State's case, creates an overwhelming showing of prejudice, necessitating relief.

II. WHERE THE DISTRICT COURT'S RULING IGNORED CRITICAL FACTS AND THE LOUISIANA SUPREME COURT ISSUED NO WRITTEN OPINION, THE LOUISIANA COURTS ERRED IN FAILING TO FIND PETITIONER'S SOLE ATTORNEY INEFFECTIVE AT THE GUILT PHASE UNDER *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984).

This Court has long recognized that in capital cases, defendants are due the highest level of procedural protection and due process to protect against error. *See, e.g., Ring v. Arizona*, 536 U.S. 584, 605-06 (2002). The fundamental safeguard for this protection is the defense counsel. However, Petitioner was given a trial counsel who admittedly did not enlist a defense team, did not establish a relationship with his client, did not conduct a guilt investigation, and did not seek input from experts. Trial counsel was not a protector of these Constitutional rights, but instead was the poster child for Constitutionally-deficient representation.

A violation of the Sixth Amendment right to counsel occurs when counsel's performance falls below an objective standard of reasonably effective representation. *See Strickland*, 466 U.S. at 687-88. In determining whether the accused has received effective assistance, courts must be mindful that "[c]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations

unnecessary." *Strickland*, 466 U.S. at 691. In other words, counsel must not "ignore[ ] pertinent avenues for investigation of which he should have been aware." *Porter v. McCollum*, 130 S. Ct. 477, 453 (2009).[8] While "strategic choices made after thorough investigation of law and fact relevant to plausible options are virtually unchallengeable," *Strickland*, 466 U.S. at 690, it is simply implausible to suggest that a choice made due to a complete failure to investigate may be deemed "strategic." And in fact, trial counsel testified at Petitioner's evidentiary hearing that he did not have a strategic reason for failing to consult with or retain a forensic pathologist. August 2012 Tr., p. 359: 17-25; 360: 7. Courts are to consider counsel's deficiencies cumulatively in considering a claim of ineffective assistance of counsel. *Id.* at 686.

Under *Strickland*, Petitioner proves prejudice by showing that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 683. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Id.*

At the August 2012 evidentiary hearing, attorney Jim Boren testified as an expert in the local and national standards for capital defense. Mr. Boren explained that in 2002, an attorney defending a person charged with first-degree murder in Louisiana was required to establish, among other things: (1) a defense team, consisting of two lawyers, a fact investigator, and a mitigation specialist; (2) a relationship with his client, produced through many hours of regular meetings; and (3) a theory of the case, which would be discussed with the jury during opening statements. August 2012 Tr., pp. 389: 22 – 26; pp.

[8] "[W]hen alibi witnesses are involved, it is unreasonable for counsel not to try to contact the witnesses and ascertain whether their testimony would aid the defense." *Bryant v. Scott*, 28 F.3d 1411, 1418 (5th Cir. 1994) (citation omitted). *See also Grooms v. Solem*, 923 F.2d 88, 90 (8th Cir. 1991) (affirming writ of habeas corpus based on violation of Sixth Amendment where counsel failed to contact potential alibi witnesses).

391: 22 – 392: 31; pp. 397: 17 –19; pp. 414: 18 – 415: 20. None of these requirements were met by Petitioner's trial counsel, Corbett Ourso.

As described above, trial counsel was the sole attorney representing Mr. Wearry at trial. He had access to an investigator, but the investigator had little experience and was, in trial counsel's opinion, not well-trained. August 2012 Tr., p. 344: 13-15. In any event, the investigator's involvement was limited to interviewing the bride and groom of the Baton Rouge wedding Petitioner attended the night of the murder. Trial counsel had only one documented meeting with his client outside of court proceedings. Finally, trial counsel did not mention Petitioner's alibi during opening arguments.

Mr. Boren also testified that the standard of practice for investigating a case in 2002 would have required the defense team (had there been one) to investigate any co-defendants and to retain a forensic pathologist. August 2012 Tr., pp. 420: 7 – 421: 31. Again, this was not done. Trial counsel did not investigate Petitioner's co-defendants and did not consult with or retain a forensic pathologist to investigate the manner in which Mr. Walber had died. August 2012 Tr., p. 359: 18-19.

In its ruling denying Petitioner relief, the District Court detailed a portion of trial counsel's failings, acknowledging that Petitioner was represented by only one attorney, that trial counsel failed to consult or retain a medical expert or forensic pathologist, and that trial counsel failed to identify and call additional alibi witnesses who were unrelated to Petitioner. Indeed, the District Court was silent as to any positive performance on the part of trial counsel, and conceded that trial counsel's representation was "perhaps not the best defense that could have been rendered." Appendix B, at 4. The District Court nonetheless concluded that trial counsel's performance "was not so deficient as to satisfy the *Strickland* standard and thereby warrant the post-conviction [sic] relief sought . . . ."

Id. In denying relief, the District Court ignored the testimony of key defense witnesses from the post-conviction hearing—Lakendrick Scott, Doris Dantzler-Scott, Paul Hutchinson, and experts Jim Boren[9] and Thomas Streed,[10]— which established failures by trial counsel that were "inconsistent with the standard of professional competence in capital cases" that prevailed in Louisiana in 2002, as described by Mr. Boren. *See Cullen v. Pinholster*, 131 S.Ct. 1388, 1407 (2011).

Without conducting any investigation into Petitioner's co-defendants and the forensic reality of the case, trial counsel could not possibly fulfill the bedrock obligation to make reasonable strategic choices about how best to defend a client. Trial counsel simply failed to investigate, which led to his parallel failure to consult with or retain experts. Such a fact is constitutionally indefensible under any interpretation of *Strickland*. Had trial counsel conducted a reasonable investigation:

- he would have learned of Sam Scott's true whereabouts on the night of Mr. Walber's murder;
- he would have learned of co-defendant Randy Hutchinson's recent surgery that left him on crutches and physically unable to bend his leg or perform the strenuous activities described by Scott, the State's prime witness;
- he would have consulted with a forensic pathologist and uncovered further impossibilities in Sam Scott's description of the manner in which Mr. Walber was killed; and
- he would have identified additional neutral alibi witnesses who could place Petitioner at a wedding reception in Baton Rouge on the night of April 4, 1998.

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[9] Mr. Boren was Petitioner's legal expert.

[10] Dr. Streed is an expert in the Rules of Engagement and Police Investigation and Interrogation Techniques.

These failings, and others, rendered trial counsel's representation ineffective, and his deficient performance prejudiced Petitioner.

A. Trial Counsel Failed to Investigate Key Witness Sam Scott

First, trial counsel failed to investigate whether or not Scott had actually witnessed the crime. Testimony from Lakendrick Scott and Doris Dantzler-Scott, Sam Scott's brother and sister-in-law, established that he had not.

As described above, Lakendrick Scott testified that he was with Sam throughout the day of April 4, 1998, and at least until 10 or 11 p.m., at least half an hour after Mr. Walber's body was discovered. August 2012 Tr., pp. 23: 13 – 22, 24: 1 – 18, 25: 16 –27, 28 – 26: 4, 26: 5 – 23, 17: 17 – 38: 9. Lakendrick's testimony was corroborated by his now-wife, Doris, who confirmed that she met up with the Scott brothers that night, her first official date with Lakendrick. And yet, trial counsel never spoke to Lakendrick Scott or Doris Dantzler-Scott. August 2012 Tr., pp. 362: 6 – 9; pp. 42: 2 – 10. There is a reasonable probability that, had the jury known that Scott did not witness Mr. Walber's murder, the outcome of the proceedings would have been different.

B. Trial Counsel Failed to Investigate Co-Defendant Randy Hutchinson

Second, trial counsel failed to uncover information relating to Randy Hutchinson's knee surgery, despite the fact that each of Scott's statements to investigators prominently featured Hutchinson as a physically active participant in Mr. Walber's murder, getting in and out of the small two-door car; dragging Mr. Walber in and out of the car, sometimes out of the hatchback through the passenger door; and at one point climbing into the hatchback area with Mr. Walber. This story was starkly undermined by the testimony of Hutchinson's father, Paul Richardson, and Dr. Paul Dworak at the August 2012 evidentiary hearing.

Mr. Richardson testified that in the weeks following Hutchinson's March 26, 1998, knee surgery, Hutchinson could not bend his leg or walk unassisted. August 2012 Tr., pp. 159-169; August 2012 Tr., pp. 163: 10 - 165: 25. Dr. Paul Dworak, an orthopedic surgeon, testified based on Hutchinson's medical records that as of May 5, 1998, there had been no disruption of the fixation device used to repair Hutchinson's patellar ligament on March 26, 1998. August 2012 Tr., p. 509: 22-28. Dr. Dworak concluded that had Hutchinson even attempted to engage in the activity described by Sam Scott, the fixation device would have failed and he would not be able to walk.[11] August 2012 Tr., pp. 523: 2 – 528: 5.

The jury did not hear about Hutchinson's surgery or his physical condition on the night of the murder. They did not know that at the time of the murder, Hutchinson was incapable of even walking unassisted. Mr. Boren testified that the standard of practice for investigating a case in 2002 would have required the defense team (had there been one) to investigate the co-defendants, such as Hutchinson, who were alleged to have committed the crime with Mr. Wearry. August 2012 Tr., p. 421: 31. Trial counsel's failure to investigate and present any evidence relating to Hutchinson's physical condition constituted deficient performance. Moreover, this failure undermines confidence in the outcome of Mr. Wearry's trial. If the jury had learned about Hutchinson's condition as

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[11] The State presented evidence from its own orthopedic surgeon, Dr. Greg Kinnett. August 2012 Tr., p. 85: 6-13. Dr. Kinnett testified that it would have been "possible" for Mr. Hutchinson to perform the acts described by Sam Scott. August 2012 Tr., p. 91: 11-21. Dr. Kinnett also testified, however, that Mr. Hutchinson's performance of several of the acts ascribed to him by Scott would present risk to the repair of Mr. Hutchinson's knee. August 2012 Tr., pp. 106: 21 – 108: 7.

The District Court found that the opinion of Petitioner's expert, Dr. Dworak was inconsistent with the State's expert and lay trial testimony, and, somewhat incomprehensibly, that his opinion was also inconsistent with Randy Hutchinson's medical records, which formed the basis of Dr. Dworak's opinion. Appendix B at 4.

observed by his father or through a medical doctor, there is a reasonable probability that the outcome of the proceedings would have been different.

C. Trial Counsel Failed to Consult with or Retain a Forensic Expert

Third, trial counsel failed to consult with a forensic pathologist. As a result, the jury never learned that Scott's account of the manner in which Mr. Walber was killed was not true. Forensic pathologist *Leroy Riddick* testified at the evidentiary hearing that, to a reasonable degree of medical certainty, Scott provided false information to the jury in describing the crime, including statements that the car had "humped over" the victim and that the car had been "revved up" before running over the victim. August 2012 Tr., p. 487: 8-14. Dr. Riddick opined that these things had not happened.[13] August 2012 Tr., pp. 489: 3 – 495: 11.

The failure of trial counsel to consult with a forensic pathologist fell below the standard of practice for a capital case in Louisiana in 2002, according to Mr. Boren. August 2012 Tr., pp. 420: 7. (In fact, Mr. Boren said that a forensic pathologist would have been required even in non-capital murder cases.) *Id.* Had the jury learned that Scott's account of the manner in which Mr. Walber was killed was false, there is a reasonable probability that the outcome of the proceedings would have been different.

D. Trial Counsel Failed to Effectively Cross-Examine Law Enforcement

Fourth, trial counsel did not identify failings in the investigation of the crime and use this information to effectively cross-examine investigators. For example, evidence

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[13] The District Court attempted to reconcile Dr. Riddick's testimony that Mr. Walber had not been hit by the tires of the car with Scott's statements to law enforcement, opining that "another possibility is that the victim may have been between the vehicle's tires" and was "struck only by the vehicle's undercarriage." However, Scott told investigators that the car had actually "hump[ed] up over" Mr. Walber's body. Appendix B, at 4; Trial Tr. at R. 2260.

presented at the hearing showed that Scott's interrogators were a likely source of his information, which evolved toward fitting evidence that they had already identified.[13] Indeed, investigators admitted in depositions taken by post-conviction counsel that they had fed Scott material facts about the case, such as where the victim was taken.[14] While taking a statement from Scott on April 18, 2000, Detective Murphy Martin asked him whether Mr. Walber was taken somewhere on a gravel road. Scott had never mentioned a gravel road prior to this question. *See* August 2012 Hearing Ex. 1, Deposition of Murphy Martin, pp. 44:17-46:22. Detective Martin agreed in his deposition, which was entered into evidence at the evidentiary hearing, that he provided Scott with this material fact.[15] *See* August 2012 Hearing Ex. 1, Deposition of Murphy Martin, pp. 46:18-47:6; 49:5-24; 49:25-50:6.

Trial counsel could have elicited similar admittances from Detective Martin at trial: he had all the facts needed to conduct a thorough cross-examination at his fingertips. All trial counsel needed to do was to read Scott's statements, identify the feeding of

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[13] During their investigation into the murder of Eric Walber, law enforcement failed to adhere to the standard of care in other respects as well. Petitioner presented testimony at the evidentiary hearing from Thomas Streed, an expert in the criminal investigation and interrogation. Dr. Streed testified that when an alleged eyewitness makes statements to investigators that are known to be incorrect, the investigators must examine whether there is a way to verify the witness's statement. *See* August 2012 Hearing Tr. pp. 45:25 – 46:11. Dr. Streed also stated that some false statements by alleged witnesses should cause an investigator to cease crediting that witness's allegations. *See* August 2012 Hearing Tr. pp. 45:3 –10. According to Dr. Streed, Sam Scott's statement that he and Eric Walber were friends was such a statement: after it was made, detectives should not have relied on Scott in any way as they continued their investigation.

[14] Supplying a witness with a material fact about the crime he allegedly witnessed does not comply with the standard of care for police interrogations and investigations. At the evidentiary hearing, this opinion was universally held by Petitioner's expert Thomas Streed, and by Detectives Benita Seger, Kelly Gideon, and Kearney Foster, who agreed that doing so contaminates the evidence. *See* August 2012 Hearing Tr. pp. 107:19 – 108:15; 187:20 – 188:13; 261:20 – 262:22.

[15] Detective Martin was not the only detective to feed Scott information. Detectives Martin, Foster, and Gill asked Scott during his April 25 interrogation whether Mr. Walber's body had been found on Crisp Road. Detective Martin agreed during his deposition that this question also passed along a material fact as to the location of the crime. *See* August 2012 Hearing Ex. 1, pp. 66:5-67:3.

information and ask the obvious questions. Unfortunately, trial counsel's weak attempt to cross-examine Detective Martin harvested equally weak success. None of the significant investigative failures were raised by trial counsel, who did not use any of the failures to cross-examine the detectives who testified.[16]

E. Trial Counsel Failed to Adequately Investigate Petitioner's Alibi

Finally, trial counsel failed to thoroughly investigate and adequately present the jury with Petitioner's alibi defense. Petitioner was at a wedding and reception in Baton Rouge with his girlfriend on the night of the murder, but trial counsel did not have a list of wedding guests by the time of trial. August 2012 Tr., p. 346: 3 – 11. And although the alibi was the sole defense presented, trial counsel did not mention it in his opening statement. Trial Tr. at R. 1724-1725. It was not until trial counsel's cross-examination of the State's tenth witness that Petitioner's alibi was mentioned. Trial Tr. at R. 1864. Trial counsel then only called three witnesses—Petitioner's girlfriend, her sister and her aunt—in support of the alibi. In its guilt phase closing argument, the State urged the jury to disregard the alibi evidence because the three supporting witnesses were all connected to Petitioner. August 2012 Tr., p. 227: 23-26; R. 2311.

At the evidentiary hearing, Petitioner presented evidence from five unbiased witnesses[17] who testified that Petitioner was present at the Helm wedding reception the

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[16] Mr. Ourso also failed to engage an expert such as Dr. Street, who could have informed the jury about the shortcomings in the State's investigation.

[17] The witnesses were: Ed Helm, the groom's best man; Errol Russell, a member of the wedding party; LaTonya Russell, a wedding guest and Errol Russell's wife; Madilena Jordan, a wedding guest; and Carolyn Helm, a wedding guest. A sixth witness, Bobbi White, a wedding guest, testified that she left the reception at about 10:30 p.m., and that other guests were there when she left. A seventh witness, Jeff Turner, the DJ for the wedding reception, testified that he left the reception at 10:30 p.m., and that the bride and groom and other guests were still there when he left. Neither Bobbi White nor Jeff Turner knew Petitioner. August 2012 Tr., pp. 77 – 105; pp. 124 – 158.

evening of April 4, 1998. These witnesses, together with two others who testified as to when the reception ended, all contradicted the State's timeline. The State admitted at the evidentiary hearing that if the jury had heard the testimony of these seven witnesses, the State could not have argued in its closing that all of Petitioner's alibi witnesses were connected to him through his girlfriend. August 2012 Tr., p. 228: 6-28.

The failure by trial counsel to call to the stand—or even to contact—the alibi witnesses presented at the evidentiary hearing was a simple failure to investigate. Trial counsel testified at the hearing that he never interviewed Petitioner's girlfriend, Ms. Dominick, or anyone else in an attempt to compile a list of wedding guests that could substantiate Petitioner's alibi. In fact, trial counsel did not even meet with Ms. Dominick until two days before the trial, in a 30-minute conversation that was not even related to the alibi. August 2012 Tr., pp. 318: 31 – 319: 13. Ms. Dominick testified at the evidentiary hearing that she could have given trial counsel a list of wedding guests, had he asked for one, including guests that were not related to either her or Petitioner. August 2012 Tr., p. 319: 14-21. With respect to his failure to mention Petitioner's alibi in his opening statement, trial counsel testified at the evidentiary hearing that "I don't remember a strategic reason for doing that." August 2012 Tr., p. 354: 7-15.

As Petitioner's legal expert, Mr. Boren, testified, trial counsel's failure to investigate the alibi fall below national and local standards for capital defense.[18] August 2012 Tr., pp. 422: 1 – 423: 6. Had the jury been presented with testimony from the additional neutral

[18] Dissenting from the Louisiana Supreme Court's writ denial, Justice Johnson agreed with Mr. Boren. She found Petitioner's alibi evidence compelling, and said that in her view, trial "counsel's performance fell far below professional norms because there were unrelated witnesses, easily available, who could have been presented to the jury" and that Petitioner was prejudiced as a result. Appendix A, at 4.

alibi witnesses who testified at the evidentiary hearing, there is a reasonable probability that the outcome of the proceedings would have been different.

F. Trial Counsel's Deficient Performance Prejudiced Petitioner

The failure to adequately investigate or present exculpatory evidence—including testimony from experts and Scott's brother and sister-in-law that would have underscored the reliability of Scott's testimony, and testimony from independent witnesses who would have corroborated Petitioner's alibi—prejudiced Petitioner. Had trial counsel performed effectively, the jury would have received credible, compelling evidence of an entirely different narrative than what was presented at trial: that Petitioner was not guilty and that the murder of Mr. Walber could not have occurred in the manner the State urged the jury to believe. In isolation or cumulatively, trial counsel's deficiencies at the guilt phase of the trial compel the conclusion that "the decision reached would reasonably likely have been different absent the errors" *Strickland*, 466 U.S. at 694-96. As such, this Court should grant this Writ and vacate Mr. Wearry's conviction.

CONCLUSION

No physical evidence connecting Petitioner to the murder. Investigating officers providing material facts of the murder to a jailhouse informant. Prosecutor violating *Brady*. Trial counsel who admitted that he conducted, essentially, no investigation, had no strategic reason for not preparing a defense, and met with Petitioner, perhaps, once, before trial. Defense as Aeolian harp.

For the foregoing reasons, the Court should grant Petitioner's petition and issue a writ of certiorari to review the decision of the Louisiana Supreme Court. Alternatively, this Court should grant the writ and remand this case back to the Louisiana Supreme Court for a merits review of the Petitioner's claims for violations of *Brady v. Maryland* and for ineffective assistance of counsel pertaining to the guilt phase of his capital trial in a manner consistent with this Court's jurisprudence.

Respectfully submitted,

Dated: May 27, 2015

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MICHAEL WEARRY

** Counsel of Record*

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL WEARRY,

Petitioner,

vs.

BURL CAIN, Warden Louisiana State Penitentiary,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE LOUISIANA SUPREME COURT

CERTIFICATE OF SERVICE

I hereby certify that Petitioner's Motion to Proceed In Forma Pauperis and Petition for Writ of Certiorari were served via regular U.S. Mail, on this 27th day of May, 2015 upon Charlotte Herbert, Livingston Parish District Attorney's Office, 20140 Iowa Street, Livingston, LA 70754. All persons required to be served have been served.

Dated: May 27, 2015

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INDEX OF APPENDICES

Appendix A — Louisiana Supreme Court, *Final Judgment and Decree and Dissenting Opinions*, February 27, 2015

Appendix B — Twenty-First Judicial District Court of Livingston Parish, Louisiana, *Reasons for Judgment*, August 14, 2013

The Supreme Court of the State of Louisiana

STATE EX REL. MICHAEL WEARRY

NO. 2013-KP-2422

VS.

BURL CAIN, WARDEN, LOUISIANA STATE PENITENTIARY, ANGOLA, LOUISIANA

- - - - - -

IN RE: Wearry, Michael; - Plaintiff; Applying For Supervisory and/or Remedial Writs, Parish of Livingston, 21st Judicial District Court Div. A, No. 01-FELN-015991;

- - - - - -

February 27, 2015

Denied.

CGG

JTK

JLW

MJC

JDH

JOHNSON, C.J., would grant the application for post-conviction relief and assigns reasons.

CRICHTON, J., dissents.

Supreme Court of Louisiana
February 27, 2015

Deputy Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

NO: 13-KP-2422

STATE EX REL. MICHAEL WEARRY

VERSUS

FEB 27 2015

BURL CAIN, Warden,
Louisiana State Penitentiary,
Angola, Louisiana

JOHNSON, C. J., would grant the application for post-conviction relief and assigns reasons:

Michael Wearry was convicted of the brutal first-degree murder of a sixteen-year-old pizza delivery boy and sentenced to death. The murder occurred on April 4, 1998 in Livingston Parish and went unsolved for three years. In his application for post-conviction relief, I find Wearry raises several valid claims with regard to 1) defense counsel rendering ineffective assistance of counsel in the guilt phase and the penalty phase and; 2) whether he is entitled to the protections of *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002).

Ineffective Assistance of Counsel at the Guilt Phase

Under the standard for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), adopted by this Court in *State v. Washington*, 491 So.2d 1337, 1339 (La. 1986), a reviewing court must reverse a conviction if the defendant establishes (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's inadequate performance prejudiced defendant to the extent that the trial was rendered unfair and the verdict suspect.

Defense counsel's guilt phase strategy consisted entirely of an attempt to undercut the credibility of the state's witnesses, followed by the presentation of three alibi witnesses. Counsel has acknowledged that at the time of trial he

believed it was unnecessary to investigate the circumstances of the victim's death and conceded that he conducted no independent investigation of the evidence, but instead relied solely upon what the state shared. Further, defense counsel conceded he had no strategic basis for his failure to investigate. In a case in which counsel was aware that the only eyewitness to the murder had given several differing accounts before trial, his decision to contest the state's theory of the case solely by cross-examination fell short of prevailing professional norms. *See Strickland*, 466 U.S. at 688-689, 104 S. Ct. at 2065; *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, pp. 76-80.

The defendant claims trial counsel should have presented additional witnesses to support his alibi and to contradict the state's rebuttal to it. At trial, counsel called relator's girlfriend, Renarda Dominick; her aunt; and her sister; who each testified that relator accompanied them to a wedding reception in Baton Rouge and remained there until 9:00 or 9:30 p.m. on the night of the murder, and that relator did not return to Springfield until between 10:00 and 11:00 p.m. *Wearry*, 03-3067 at pp. 14-15, 931 So.2d at 309. The defendant claims he would have had to leave Baton Rouge no later than 7:30 p.m. to participate in the murder, and asserts that he actually did not leave until 9:00 or 9:30 p.m.

At the post-conviction hearing, relator presented seven additional witnesses who attended the wedding reception and were unrelated to the defendant. Specifically, the additional witnesses were: (1) Ed. Helm, the best man at the wedding, who testified that relator and Renarda arrived at the reception between 7:00 and 7:30 p.m., exh. 99, pp. 81-83; (2) Errol Russell, who saw relator at the reception and spoke with Renarda after the dinner and wedding party toasts concluded, and then spoke with her again 30 to 45 minutes later, *id.* at pp. 146-49; (3) LaTonya Russell, who testified that after an hour or an hour and 30 minutes of dinner and toasts at the start of the reception, Errol Russell left his seat with the

wedding party to join her; that thereafter she met relator; and that she and Errol left with the bride and groom around 10:00 p.m., *id.* at pp. 133-37; (4) Jeff Turner, the DJ at the reception, who testified that he did not close down until between 10:00 and 11:00 p.m. and that when he left the bride and groom were still there, *id.* at pp. 99-104; (5) Bobbi White, who testified that the reception began around 9:00 or 9:30 p.m. and that about half the guests were still there when she left around 10:00 or 10:30 p.m., *id.* at pp. 125-27; (6) Madeline Jordan, who testified that relator and Renarda were not yet at the reception when she arrived; that they later arrived; and that she said goodbye to Renarda and relator who were both still there when she left sometime after dark, *id.* at pp. 155-57; and (7) Carolyn Helm, who testified that she attended the reception from about 6:00 to 9:00 p.m. and danced with Renarda over the course of a couple of hours. *Id.* at pp. 91-95.

Courts have "recognized that when trial counsel fails to investigate and present an alibi witness, '[t]he difference between the case that was and the case that should have been is undeniable.'" *Caldwell v. Lewis*, 414 Fed.Appx. 809, 818 (6th Cir. 2011) (internal citations omitted). Indeed, it has been held that "[e]yewitness identification evidence[, as this case rested on,]... is precisely the sort of evidence that an alibi defense refutes best." *See Griffin v. Warden, Maryland Corr. Adjustment Ctr.*, 970 F.2d 1355, 1359 (4th Cir. 1992).

Counsel's alibi investigation was unreasonably limited given its importance to relator's defense. According to the state's evidence, the victim left his last pizza delivery around 8:20 p.m. and his body was discovered 70 minutes later, at 9:30 p.m. *Weary*, 03-3067, pp. 2-3, 931 So.2d at 302. Given the short timeline in the case, any additional evidence which indicated that relator was at a wedding reception nearly an hour's drive away at any point immediately preceding or overlapping with the 70-minute window in which the abduction and murder took place would have cast doubt on the state's theory of the case.

Given the evidence post-conviction counsel was able to gather several years later, it appears trial counsel could have reasonably done as much or more to establish relator's alibi. Counsel failed to procure and present additional alibi testimony from anyone else, even though it would have been of measurable benefit to present at least one witness who appeared less biased than the three people with whom relator attended the reception. *Cf. Johnson v. Mann*, 1993 U.S. Dist. Lexis 5238, (S.D.N.Y. Apr. 20, 1993) ("As to the alibi issue, counsel made the strategic decision . . . [not] to rely on the inherently suspect testimony of family members."). In my view, counsel's performance fell far below professional norms because there were unrelated witnesses, easily available, who could have been presented to the jury.

Having established that counsel's performance fell short of prevailing professional norms, relator must also show prejudice as a result of counsel's performance. Assuming that some or all of the additional witnesses would have testified at trial as they did at the post-conviction hearing, they would have provided an expanded context for relator's alibi and generally bolstered the credibility of the three witnesses who were presented. The proffered witnesses would have also contradicted the state's rebuttal. In the absence of additional support for his alibi, the verdict was rendered upon an incomplete presentation of the evidence that could have been gathered through a reasonable investigation. Counsel's investigation fell below professional norms and relator was prejudiced as a result.

Ineffective Assistance of Counsel at the Penalty Phase

A defendant at the penalty phase of a capital trial is entitled to the assistance of a reasonably competent attorney acting as a diligent, conscientious advocate for his life. *State v. Fuller*, 454 So.2d 119, 124 (La. 1984); *State v. Berry*, 430 So.2d 1005, 1007 (La. 1983); *State v. Myles*, 389 So.2d 12, 28 (La. 1980) (on reh'g). The

role of an attorney at capital sentencing resembles his role at trial in that he must "ensure that the adversarial testing process works to produce a just result." *Burger v. Kemp*, 483 U.S. 776, 788-89, 107 S.Ct. 3114, 3122-26 (1987).

To show that counsel rendered ineffective assistance at the penalty phase, Wearry must meet the standard set out by this Court in *State v. Hamilton*, 92-2639, p. 6 (La. 7/1/97), 699 So.2d 29, 32, under which it must be shown that counsel failed to undertake "a reasonable investigation (which) would have uncovered mitigating evidence," and that failing to put on the available mitigating evidence "was not a tactical decision but reflects a failure by counsel to advocate for his client's cause," which caused Wearry "actual prejudice." *Hamilton*, 92-2639 at 6, 699 So.2d at 32 (citing *State v. Brooks*, 94-2438 (La. 10/15/95), 661 So.2d 1333; *State v. Sanders*, 93-0001 (La. 11/30/94), 648 So.2d 1272)). This Court has held

> Ineffective assistance of counsel in the penalty phase of capital cases is a recurring problem. In many cases defense counsel, after vigorously contesting the guilt phase, has turned the case over to the jury for penalty determination with little additional evidence or argument, perhaps because the emotional and physical strain on the sole defense counsel in the losing effort in the guilt phase lessens his ability to maintain the same performance level in the immediately following penalty phase.

State v. Williams, 480 So.2d 721, 728, n.14 (La. 1985). The ABA Guidelines provide an instructive overview of the scope of counsel's duty to investigate at the penalty phase in a capital case and provide that counsel explore, *inter alia*, the defendant's: medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage); family and social history (including physical, sexual or emotional abuse; history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence); educational history; and

employment and training history. *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, pp. 81-82 (2003).

Wearry's penalty phase consisted of the prosecutor's opening statement, which indicated the state's intention to establish aggravating circumstances warranting the death penalty, defense counsel's opening statement in which he expressed disappointment in the verdict and asked the jury to keep an open mind and make the "just choice;" and defense counsel listing three mitigating factors which may apply:

> The mitigating circumstances that you can consider, among them are prior criminal history. There is some. You determine whether it is significant enough to punish in which direction. The youth of the offender at the time. Michael Wearry was 20 years old at the time. You make that determination as to whether you think that is a mitigation circumstance in your mind. One of them is the offender was a principal whose participation was relatively minor. Well, again, you have already weighed those facts in the guilt phase and you are the one that knows in your mind what you think, whether it was participation in general or a specific participation, you have made that determination and so keep that in mind as you weigh this. And finally, any other relevant mitigating circumstances and we will be attempting to put on family members and let them tell their story to you, also.

Trial Tr. at pp. 2347-48.

Counsel's advocacy for Wearry's life may be classified as subdued, at best. In his opening remark, counsel chose to emphasize three mitigating circumstances, and did so without explaining why Wearry should not receive a death sentence. Counsel failed to elicit any additional mitigating circumstances and failed to argue in closing why the jury should consider anything that was presented to sway it from imposing a death sentence. The evidence that was actually elicited did not constitute the sort of mitigating circumstances that tend to be compelling in a capital case.

Accepting that counsel generally failed to establish any mitigating circumstances, the first inquiry under *Hamilton* is whether a reasonable investigation would have uncovered any mitigating evidence. *See* 92-2639, p. 6,

699 So.2d at 32. The relevancy threshold for mitigation evidence is extremely low and is satisfied by evidence which "'tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" *Tennard* v. *Dretke*, 542 U.S. 274, 284, 124 S.Ct. 2562, 2570, 159 L.Ed.2d 384 (2004) (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440-441, 110 S.Ct. 1227, 1232, 108 L.Ed.2d 369 (1990)); La.C.Cr.P. art. 905.5(h). In capital cases, the relevancy standard essentially translates into "whether the evidence is of such a character that it might serve as a basis for a sentence less than death." *Id.*, 542 U.S. at 285, 124 S.Ct. at 2571 (citation and quotations omitted). Critically, a defendant need not show a nexus or causal relationship between his tormented childhood or disabilities and his crime. *Tennard*, 542 U.S. at 287-88, 124 S.Ct. at 2571.

In support of the instant application, post-conviction counsel presented evidence that Wearry's childhood was influenced by abuse, poverty, instability, and neglect. Wearry's older cousin, Daytra Miller, with whom he spent a good deal of time growing up and sometimes resided, illustrated the circumstances of his childhood. Daytra testified that although there were periods of relative stability, Wearry's mother regularly beat him severely enough to leave marks and bruises. Daytra testified that Wearry's teachers sought to place him in special education, but his mother was opposed to special assistance, and that Wearry regularly struggled with homework. According to Daytra, the method employed by Wearry's mother to assist him with homework was to hit and whip him when he failed to give correct answers. Daytra testified that she knew Wearry had often been disciplined at school for bad behavior, but that she and her siblings tried to intercept teachers' notes to shield Wearry from being beaten as punishment. Corroborative of Daytra's testimony regarding the physical abuse, when Wearry was sent to live in California at age 12, his father and step-mother observed that he

was covered in welts and bruises upon arrival. Wearry's father then discovered that his mother's new husband, Larry Sibley, had also been beating Wearry.

The district court neglected to address counsel's penalty phase performance, but rather denied relief because it found the evidence insufficient to establish that Wearry was mentally retarded and therefore insufficient to show a reasonable probability of a different outcome. Upon review of the trial transcript and evidentiary hearing testimony, however, it is evident that a reasonable penalty phase investigation would have uncovered a substantial amount of relevant mitigating evidence, which was not presented to the jury. *See Hamilton*, 92-2639, p. 6, 699 So.2d at 32; *see also Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background [or to emotional and mental problems] may be less culpable than defendants who have no such excuse.") (internal quotation marks omitted)); *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982) ("[T]here can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant."). Post-conviction counsel presented evidence that, in addition to the physical abuse inflicted while in his mother's custody, Wearry has cognitive problems, brain damage, and Fetal Alcohol and Post-Traumatic Stress Disorders. Such findings would have served as compelling mitigating evidence. Although counsel consulted with Wearry and interviewed his family, he failed to conduct a meaningful investigation into his mental health and childhood, which may have persuaded jurors to spare his life. *See, e.g., Porter v. McCollum*, 558 U.S. 30, 41, 130 S.Ct. 447, 454, 175 L.Ed.2d 398 (2009) (finding that evidence of poor mental health or mental impairment, in addition to other mitigating evidence, could influence a jury's appraisal of

defendant's moral culpability); *see also Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) ("[E]vidence about defendant's background and character is relevant because of the belief . . . that defendants who commit criminal acts that are attributable to . . . emotional or mental problems . . . may be less culpable than defendants who have no such excuse."), abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

The second inquiry under *Hamilton* is whether counsel had a tactical reason for failing to investigate and present mitigating evidence. *See* 92-2639, p. 6, 699 So.2d at 32. Upon reviewing his penalty phase performance, counsel admitted that he did not conduct any investigation and did not hire a mitigation specialist. He also testified that he had no tactical or strategic reason for these failings, save a perception that the public defender's limited resources would not permit it. However, lack of funding does not constitute a strategic basis for failing to advocate on a defendant's behalf, especially in a capital case. *See generally Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, (counsel has an independent duty, even in the face of a defendant's refusal to cooperate or his outright opposition, to delve into the defendant's background for mitigating evidence that might persuade a jury to spare his life). *See generally State v. Sparks*, 88-0017 (La. 5/11/11), 68 So.3d 435, 484 ("[W]hile the failure to present mitigating evidence at trial can be reasonable if shown to be the result of tactical decision, the failure to investigate the existence of such evidence is ineffective assistance of counsel.") (citing *State ex rel. Busby v. Butler*, 538 So.2d 164, 171 (La. 1988) (collecting cases)).

Finally, the last inquiry under *Hamilton* is whether Weary suffered prejudice as a result of counsel's deficient performance, or rather, whether the jury would still have found the death penalty warranted if it had heard the mitigating

circumstances. *See Hamilton*, 92-2639, p. 6, 699 So.2d at 32. Because of the relatively superficial evidence presented on Wearry's behalf at the penalty phase, it is likely the jury was convinced there were no truly mitigating circumstances. Thus, as a result of counsel's failure to investigate, the jury was left unaware of evidence that Wearry suffered from Fetal Alcohol Spectrum Disorder, Post-Traumatic Stress Disorder, and intellectual and cognitive impairments. Given that jurors "must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime," it is reasonable to conclude that Wearry suffered prejudice in the minds of at least some jurors in the absence of the mitigating evidence now presented. *See Blystone v. Pennsylvania*, 490 U.S. 299, 304-05, 110 S.Ct. 1078, 1082, 108 L.Ed.2d 255 (1990) (*quoting Penry*, 492 U.S. at 327-28, 109 S.Ct. at 2951). *See State v. Ford*, 10-1151 (La. 2/4/11), 57 So.3d 297; *see also State v. Brooks*, 94-2438 (La. 10/16/95), 661 So.2d 1333, 1339; *State v. Sullivan*, 596 So.2d 177, 192 (La. 1992) *rev'd on other grounds*, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (finding ineffective assistance at penalty phase in capital case where counsel failed to present evidence of defendant's mental impairment, that he was severely abused as a child, and that his mother and sisters loved him; and concluding that evidence of mental illness "has the potential to change totally the evidentiary picture by altering the causal relationship which can exist between mental illness and homicidal behavior." (citing *Busby*, 538 So.2d at 173)).

Atkins v. Virginia

The defendant claims he is exempt from capital punishment because he is mentally retarded. He argues the trial court erred in finding this claim procedurally barred and in concluding that he failed to show a reasonable probability that the outcome would have been different. Mr. Wearry asserts that the proper test is not whether he has demonstrated that the outcome would have been different if he had

raised the claim at trial, but rather whether he has shown by a preponderance of the evidence that he is mentally retarded.

The American Association on Intellectual and Developmental Disabilities (AAIDD) and the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) define mental retardation as significantly subaverage intellectual functioning accompanied by significant limitations in adaptive functioning, originating before the age of 18. *Atkins v. Virginia*, 536 U.S. 304 at 308 n.3, (2002). The Court in *Atkins* embraced these definitions of mental retardation. *Id.* at 308. Louisiana, however, has seized upon language in *Atkins* that permits lower courts and state legislatures to define their own procedural rules to "enforce the constitutional restriction," as license to apply methods that deviate from and are more restrictive than the accepted scientific and clinical definitions. *Atkins'* directive mandates that states may establish procedural rules, but should adhere to the scientific and clinical definitions of mental retardation set forth by the AAIDD and the DSM-IV-TR. *Atkins*, 536 U.S. 304, 317 (2002) (citing *Ford v. Wainwright*, 477 U.S. 399 (1986). The Court gave states authority over the procedures used to implement the categorical exemption, such as whether determinations of mental retardation should be made by a judge or by a jury, whether determinations should occur before or after guilt-innocence trials, which party bears the burden of proof, and what entitles a mental retardation claim to an evidentiary hearing or bars it by procedural default. The Court also anticipated case-by-case dispute over the fact-intensive determination of whether a particular defendant has mental retardation. But, the Court did not give states license to narrow the class of persons who fall within the constitutional prohibition. Deviations in how mental retardation is defined can result in exactly what *Atkins* prohibits: the execution of capital defendants who have mental retardation.

Under *State v. Williams*, 01-1650, p. 27 (La.11/01/02), 831 So.2d 835, 857, to establish mental retardation, a defendant must first show that he has significantly sub-average intelligence, as generally measured by standardized IQ tests. *Williams*, 831 So.2d at 853-54. The Wechsler and Stanford-Binet IQ tests are frequently used to assess intelligence and both utilize a mean score of 100. *Id.* at p. 23, n.26, 831 So.2d at 853. The Wechsler scale uses a standard deviation of 15 in assessing whether a score indicates above or below average intelligence. *Id.* Thus, a person with a score two standard deviations below average would score an IQ of 70 on the Wechsler scale. However, sub-average general intellect, as indicated by an IQ score, is not the sole criterion for determining whether a person is mentally retarded: sub-average intellect must be accompanied by significant deficits in adaptive skills which manifested during the developmental stage. *Id.*

The defendant's I.Q scores are 72 and 75. A person is considered mentally retarded within this range if their adaptive functioning is substantially impaired. (Citing DSM-IV at 42.) According to Dr. Shaffer, a clinical and neuropsychologist hired by the defense, defendant's test results on the Adaptive Behavior Assessment indicate significantly sub-average adaptive functioning. Dr. Shaffer testified that the defendant may have been genetically predisposed to suffer from mental retardation because his mother has an IQ of 65 and one of his sisters was mentally retarded with severe behavioral problems. Dr. Hope administered the Adaptive Behavior Scale to defendant, which shows that defendant suffered from impaired adaptive skills at age 16. The defendant also presented evidence demonstrating academic impairment at or below 6th grade levels, as well as evidence of deficits in daily skills and that his disorders manifested prior to his 22nd birthday. *See Williams*, 01-1650, p. 24, 831 So. 2d at 854. Based on these facts, the defendant has demonstrated that he is not subject to the death penalty pursuant to *Atkins*.

In addition, post-conviction counsel presented expert testimony and evidence demonstrating that Wearry had been diagnosed with Fetal Alcohol Spectrum Disorder and, as a result, displayed intellectual and adaptive functioning impairments. Wearry was also diagnosed with Post-Traumatic Stress Disorder, resulting from the ongoing physical abuse which was "so severe that [it] caused [Wearry] to fear for his life," and an incident of sexual assault which occurred when his mother left him unattended. According to Dr. Robert Shaffer, Wearry's mother drank so excessively that she often wandered off and left her children for several days. On one such occasion, when Wearry was seven or eight, he and his siblings were left unsupervised at the home of another person. While there, a group of teenaged boys stripped Wearry of his clothing in the bathroom and assaulted his anus with an alcohol bottle. Wearry's older brother Cornell testified that he heard Wearry screaming and attempted to rescue him but was prevented by the assailants. Cornell told Dr. Shaffer that, after the incident, Wearry was a changed person; much less trusting and avoided bathing whenever possible. According to one of Wearry's teachers around this time, he began to display exaggerated and startled reactions with little prompting. Further, Dr. Shaffer testified that Wearry has cognitive defects, neurological impairment, and is of sub-average intelligence. State-hired psychologist, Dr. Donald Hoppe, agreed that Wearry suffered from cognitive problems, brain damage, abuse, and post-traumatic stress disorder. The testimony presented paints a picture of a young man with an extremely troubled upbringing and sub-average intelligence. In my view, he has sufficiently demonstrated entitlement to the protections afforded by *Atkins*.

SUPREME COURT OF LOUISIANA

No. 13-KP-2422

STATE EX REL.
MICHAEL WEARRY

FEB 17 2015

v.

BURL CAIN, Warden,
Louisiana State Penitentiary,
Angola, Louisiana

SC

CRICHTON, J., dissents

I dissent from the majority's denial of this writ application. In my view, this writ should be granted and the case remanded to the trial court to directly and fully address the issue of whether defendant is intellectually disabled[1] and entitled to the protections of *Atkins* v. *Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and it should not be considered under the vast umbrella of the defendant's claim of ineffective assistance of counsel. Specifically, I believe the trial court erred by conflating the *Atkins* claim with the ineffective assistance of counsel claim, thereby underweighting the defendant's

[1] The term "intellectually disabled" was adopted by the United States Supreme Court in *Freddie Lee Hall* v. *Florida*, 134 S. Ct. 1986, 1991, 188 L.Ed.2d 1007 (2014):

> Previous opinions of this Court have employed the term "mental retardation." This opinion uses the term "intellectual disability" to describe the identical phenomenon. See Rosa's Law, 124 Stat. 2643 (changing statutes in the U.S. Code from "mental retardation" to "intellectual disability"); Schalock et al., The Renaming of Mental Retardation : Understanding the Change to the Term Intellectual Disability, 45 Intellectual & Developmental Disabilities 116 (2007). This change in terminology is approved and used in the latest edition of the Diagnostic and Statistical Manual of Mental Disorders, one of the tools most used by psychiatrists and other experts; the manual is often referred to by its initials "DSM," followed by its edition number, e.g., "DSM-5." See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 33 (5th ed. 2013).

Atkins claim. As such, I would grant this writ application and remand it to the trial court to reconsider the evidence adduced pertaining to defendant's *Atkins* claim, and allow the district attorney and defense counsel to supplement and further develop the record on whether the defendant is actually intellectually disabled. If the defendant is deemed intellectually disabled and afforded the protections under *Atkins*, he is exempt from the death penalty and that claim, in my opinion, cannot be procedurally defaulted.

NOTICE OF REASONS FOR JUDGMENT

State of Louisiana

Vs

MICHAEL WEARY

Case 02-FELN-0(1291)
Division A
21st Judicial District Court
Parish of Livingston
State of Louisiana

August 14, 2013

DAVID MOYES CAPITAL POST CONVICTION PROJEC
1340 POYDRAS STREET SUITE 1700

NEW ORLEANS, LA 70112

Please find attached a certified copy of the Reasons for Judgment signed by the Honorable WAYNE RAY CHUTZ on August 14, 2013.

If I can be of further assistance, please do not hesitate to call.

Thomas L. Sullivan, Jr.
Livingston Parish Clerk of Court
21st Judicial District Court
State of Louisiana
Parish of Livingston

Deputy Clerk of Court

STATE OF LOUISIANA	21st JUDICIAL DISTRICT COURT
VS. NO. 01-FELN-001393	PARISH OF LIVINGSTON
MICHAEL WEARY	STATE OF LOUISIANA
FILED:_____	_____
	DEPUTY CLERK OF COURT

REASONS FOR JUDGMENT

This matter came before the Court as an Application for Post Conviction Relief (PCR) pursuant to La. C.Cr.P. arts 924 *et seq*, following a trial held in March, 2002, which resulted in a conviction for first degree murder and recommendation of the death sentence for the defendant, Michael Weary. On November 28, 2011, after several status conferences the State and counsel for defendant entered into a stipulation that the defendant was entitled to an evidentiary hearing pursuant to La. C.Cr.P. art 930.

Prior to the commencement of the evidentiary hearing, both the State and defense counsel agreed to bifurcate the presentation of evidence into two phases: the first phase to hear evidence related to issues presented in the application concerning the guilt portion of the trial, and the second phase to be for the taking of evidence relevant to the sentencing portion of the trial, in the context of issues presented in the PCR Application. The first phase of the hearing was conducted from August 13-21, 2012. The hearing was then resumed until June, 2013, when the hearing was reconvened for the purpose of taking evidence related to the penalty phase.

After the conclusion of the presentation of evidence, and after giving both the State and defense counsel 15 days to file any post-trial memoranda they deemed appropriate, the court took the matter under advisement. A review of the record indicates that memoranda for both the State and defendant have been filed. Accordingly, the court now issues the following findings and reasons for judgment.

The defendant's application may be summarized as alleging five issues as bases for relief: 1) Ineffective assistance of counsel in the guilt and (2) penalty phases of the trial; 3) Failure of the State to provide exculpatory evidence during the guilt phase, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and 4) A post-trial assertion of Mental Retardation as a defense to the imposition of the death sentence under La.C.Cr.P. art 905.5.1. Each issue will be addressed

CLERK OF COURT
PARISH OF LIVINGSTON

accordingly.

INEFFECTIVE ASSISTANCE OF COUNSEL

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), the Court articulated a two-part test for determining when counsel's ambivalence may be deemed so ineffective as to result in a denial of a defendant's Sixth Amendment Right to Counsel. First, the defendant must show that counsel made errors so serious that he was not functioning as contemplated by the Sixth Amendment. *Id.* at 687. Second, there must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* At 694. The *Strickland* Court further noted that, when applying this two-pronged test in order to ascertain whether articulated errors by counsel created the necessary level of prejudice, a reviewing court should "presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law." *Id.*

The defendant asserts that Corbett Dunn, Jr., was the sole attorney representing him during the trial as his first point in support of his claim of ineffective assistance of counsel. A review of all trial court minutes indicates that the Office of the Public Defender for the 21st Judicial District was appointed to represent Mr. Weary at arraignment. The appointment was made pursuant to La. R.S. 9:143, which was in effect during the time relevant to the prosecution of the defendant.

Absent an evidentiary showing to the contrary, this court must presume that the Office of the 21st Judicial District Public Defender complied with the standards governing appointment of counsel as forth in the 2021 version of La. R.S. 15:143 A. (1)(a). However, even if the relevant standards governing appointment of defense counsel in capital cases were not complied with, it is incumbent upon the applicant to also show that the violation created actual prejudice. The applicant has made no such showing.

Other than cross-examining the state's witnesses, Mr. Weary's counsel primarily relied upon an alibi defense during the guilt portion of the trial. The basis of the alibi defense was that, because Mr. Weary had attended a wedding reception in East Baton Rouge Parish, he would not have been present in Livingston Parish at the time of the abduction of the victim.

In support of this theory, defense counsel called three witnesses that had attended the

wedding reception, namely: Darlene Johnson; Kim Dominick Armstrong; and Rosario Dominick. All testified that the defendant, Michael Weary, had attended the wedding reception. However, the witnesses were not able to agree as to when Mr. Weary may have departed the wedding reception.

In the instant application, defendant contends that, after a thorough investigation by his post-conviction relief team, numerous witnesses were discovered that could have offered testimony favorable to him at the trial. Defendant asserts that the failure to call these witnesses constituted ineffective assistance of counsel, and that, under the second prong of the *Strickland* analysis, this resulted in the defendant's having been deprived of a trial with reliable results.

After thoroughly considering the testimony of the dozen or so witnesses called by the defendant on August 13-14, 2013, it is apparent that all witnesses, including those called, seem to agree that Mr. Weary did in fact attend the wedding reception; but their accounts are markedly inconsistent as to when Mr. Weary may have departed the reception. As such, based upon the additional testimony, a reasonable trier of fact could have concluded that Mr. Weary did, in fact, attend the reception. However, because the pivotal issue in establishment of a viable alibi defense was the time of Mr. Weary's departure, the additional testimony could not have produced a more favorable result to Mr. Weary than that effected by the three witnesses actually called at trial. Consequently, insofar as failing to call these witnesses has been alleged as a basis for the defendant's claim of ineffective assistance of counsel, such failure ultimately created no prejudice to Mr. Weary.

Counsel for the defendant also called two expert witnesses at the evidentiary hearing: Dr. Leroy Riddick, M.D., who was accepted by the court as an expert in the area of Forensic Pathology; and Dr. Paul Dworak, M.D., who was accepted by the court as an expert in the area of Orthopedic Surgery. The testimony of these experts was introduced as evidence of Mr. Curso's failure to properly test the State's theory of the mechanism of the killing of the victim, insofar as said theory was testified to at trial.

Dr. Riddick opined that the injuries sustained by the victim were inconsistent with being run over by a vehicle several times. In particular, Dr. Riddick stated that, if the vehicle had run over the victim as testified to at trial by Sam Scott, the resulting injuries should have been consistent with spinning tires; in particular, the victim would have sustained tearing of the skin,

and some rubber would have been transferred from the vehicle's tires to the body of the victim. However, Dr. Riddick's opinion assumes that the tires of the vehicle actually passed over the victim. Another possibility is that the victim may have been between the vehicle's tires, in which case the victim would have been struck only by the vehicle's undercarriage.

Dr. Dworak opined that the knee surgery performed on Randy Hutchinson eight days prior to the murder would have prevented Hutchinson from acting in the manner indicated by the State's witness, Sam Scott, at trial. Dr. Dworak's opinion is inconsistent with Hutchinson's medical records; the opinion of Dr. Greg Kinnet, the State's expert; and lay testimony offered at trial. While this court does not necessarily concur with the State in asserting that Dr. Dworak's conclusion may be "ridiculous," this court is of the opinion that Dr. Dworak's opinion would not have created a reasonable probability of a different outcome, and therefore that Mr. Owen's failure to offer the same did not undermine confidence in the verdict.

As the *Strickland* Court noted, "[i]t is not enough for the defendant to show that the [allegedly deficient counsel's] errors had some conceivable effect on the outcome of the proceeding." *Strickland* v. *Washington*, 466 U.S. at 693. Accordingly, this court finds that the representation afforded to Mr. Weary by Mr. Owen during the guilt phase of the trial, while perhaps not the best defense that could have been rendered, was not so deficient as to satisfy the *Strickland* standard and thereby warrant the post conviction relief sought in the instant application.

BRADY VIOLATIONS

Brady v. *Maryland*, *supra* at 87, the Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Evidence is material to a finding of guilt, and therefore must be disclosed, where there is a reasonable probability that effective use of the evidence will result in an acquittal. *United States* v. *Bagley*, 473 U.S. 667, 676 (1985).

The applicant's listing of evidence of Brady violations may be classified as noting four categories of evidence not presented by the State prior to trial: Randy Hutchinson's medical records; Ms. Hahn's inconsistent statements regarding timing of the applicant's departure from the wedding reception; trial witness Eric Charles Brown's seeking of leniency in exchange for his

testimony; and evidence regarding "a host of alternate suspects[.]"

Because it is necessarily difficult for the prosecution to assess whether evidence may be classified as "material" prior to trial, this court is of the opinion that, as a matter of policy, it is better to err on the side of disclosure. As such, insofar as the State failed to produce the evidence listed in the instant application, it probably ought to have done so. Unfortunately for the viability of the applicant's claim for relief in this context, however, and after thorough consideration, this court is of the opinion that none of the evidence noted in the instant application may be categorized as "material" in the context of possible Brady violations. Further, even in the event that the fact of non-disclosure itself may be classified as a violation, none of the evidence identified, in the event that it had been effectively utilized by defense counsel at trial, produces a reasonable probability that the defendant would have been acquitted.

First, Randy Hutchinson's medical records do not show that he could not have participated in the crime by virtue of his physical condition. To the contrary, Hutchinson's medical records indicate that he was not compliant with the limitations on physical activity prescribed by his treating physician. When viewed in the context of testimony of the State's expert, Dr. Greg Kjonet, who opined that Hutchinson would in fact have acted in a manner consistent with the account of Hutchinson's actions as attested to in layperson testimony, the inclusion of Hutchinson's medical records as evidence produced to defense counsel, even assuming effective utilization of such records by counsel, does not produce a reasonable probability of acquittal.

Second, Ms. Heim's statement regarding the possible time of the applicant's departure from the wedding reception differs very little from her testimony at trial. In both her statement to police and her trial testimony, she indicated that she was not certain of the applicant's time of departure. In both accounts, Ms. Heim approximated that she had left the reception between 8:30 and 9:00 p.m. In her statement, Ms. Heim indicated that she was not sure whether the applicant was still present at the reception when she left; at trial, Ms. Heim testified that she had not seen the applicant at the time that she left and had assumed that he was gone.

Ms. Heim's uncertainty as to the time of the defendant's departure was consistent with the accounts of other witnesses called by defense counsel at trial. Additionally, because Ms. Heim's statement would not have been appreciably inconsistent with her trial testimony, it would

not have been an effective method of impeaching her testimony. As such, her statement cannot be properly classified as "material" in a Brady analysis, nor can it be said to produce a reasonable probability of acquittal.

Third, the applicant asserts that the State failed to disclose its witness Eric Charles Brown's attempt to seek leniency in exchange for testimony. Disclosure of this information and its effective utilization by defense counsel could arguably have had a measurable effect on the weight afforded by the jury to Brown's testimony. However, there is no evidence to suggest that Brown was actually able to obtain any benefit or any assurance of a possibility thereof prior to testifying at trial. Further, taken in the context of all of the evidence produced at trial to incriminate the defendant, the evidence regarding Brown's attempt to acquire some advantage by testifying would not have produced a reasonable probability of the defendant's acquittal.

Finally, with regard to the applicant's assertion that the State failed to produce information linking individuals other than the applicant to the crime, the weight of the evidence against the defendant at trial was sufficient to justify a finding of guilt, even in the presence of evidence of other possible suspects. As such, this court is of the opinion that such information was not "material" pursuant to *Brady v. Maryland*, *supra*, and its progeny.

ATKINS CLAIM

Applicant asserts that he has established that he suffers from mental retardation. Therefore, applicant argues that he is exempted from capital punishment pursuant to the Eighth Amendment to the United States Constitution's prohibition against cruel and unusual punishment, as set forth in *Atkins v. Virginia*, 536 U.S. 304 (2002). This court is of the opinion that the applicant's claim is procedurally barred. Even assuming that the applicant has properly introduced a claim of ineffective assistance of counsel, this court finds that the applicant has not met the criteria for proving that he is mentally retarded, and therefore that he has not satisfied the second prong of the *Strickland* test.

The applicant's assertion of mental retardation was not presented to the trial court. After the Supreme Court's decision in *Atkins*, *supra*, and in accordance with the *Atkins* Court's pronouncement that it was leaving the States the task of implementing the methods for enforcement of its directive (*Atkins* at 317), Louisiana enacted La. C.Cr.P. Art. 905.5.1. Section B of that article provides that "[a]ny capital defendant who claims to be mentally retarded shall

file written notice thereof within the time period for filing of pretrial motions as provided by Code of Criminal Procedure Article 521. (Emphasis added). In addition, pursuant to La. C.Cr.P. Art. 841, an error of which a defendant wishes to avail himself after conviction must be objected to at the time of its occurrence. Finally, the state supreme court has noted that it will not consider any alleged errors with regard to the penalty phase of trial, in the absence of a contemporaneous objection at trial. *State v. Bell*, 09-0199 (La. 11/30/10); 53 So. 3d 437, 455; *also see State v. Hawkins*, 486 So. 2d 643, 647 (La. App. 1st Cir. 10/5/86); *writ denied*, 500 So. 2d 420 (La. 1987). Therefore, because the applicant's defense of mental retardation was not raised at trial, it is not now properly asserted in his application for post-conviction relief.

To the extent that the applicant has introduced an allegation of ineffective assistance of counsel, this court finds insufficient proof of mental retardation; therefore, the applicant has not demonstrated a reasonable probability of a different outcome. Testimony introduced by both the state and the applicant indicated that the applicant likely suffers from both Fetal Alcohol Spectrum Disorder, a term describing any number of a range of effects occurring in an individual whose mother drank alcohol during pregnancy, and Post Traumatic Stress Disorder, a condition developing after an individual is exposed to traumatic events. Otherwise, evidence was extrapolated from recounted recollections, including those of the applicant's mother (a self-professed alcoholic; drug addict; and abusive parent); aunt; and sister. Post-conviction counsel also introduced evidence of the applicant's participation in special education classes during the applicant's primary and secondary school years.

As noted by the Court in *Atkins*, "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Atkins* at 317. La. C.Cr.P. Art. 905.5.1(H)(2) provides a list of nineteen conditions, noting that a diagnosis of one or more of those conditions does not necessarily constitute mental retardation. It is the opinion of this court that diagnoses of Fetal Alcohol Spectrum Disorder and Post Traumatic Stress Disorder, compounded with impressions of the applicant's intellectual abilities recalled and recounted over two decades later, are not sufficient to prove that the applicant is mentally retarded. Therefore, this court cannot conclude that admission of evidence of the applicant's alleged mental retardation at trial would have been sufficient to introduce a reasonable probability of a different result; insofar as the applicant's

assertion of mental retardation may be viewed in the context of a claim of ineffective assistance of counsel, such claim is not cognizable.

For the reasons hereinabove stated, this court finds that the claims asserted in Michael Weary's Application for Post Conviction Relief are without merit. Accordingly, the Application is denied.

Livingston, Louisiana this 14 day of August, 2013.

JUDGE WAYNE RAY CHUTZ
21st Judicial District Court, Division "A"

Please send notice to all counsel.

STATE OF LOUISIANA
VS. NO. 01-FELN-0015992
MICHAEL WEARY
Reasons for Judgment on Post Conviction Relief

21st JUDICIAL DISTRICT
PARISH OF LIVINGSTON, LA
A true copy of the original
This 8/14/2013
Deputy Clerk of Court